

Exhibit U



UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

NETLIST INC.,

a Delaware corporation,

Plaintiff-Appellee,

vs.

Case No.: 22-55209

SAMSUNG ELECTRONICS CO., LTD.

a Korean corporation,

Defendant-Appellant.

10

11

12

TRANSCRIPT OF AUDIO-RECORDED ORAL ARGUMENT

14 Before: M. SMITH and DESAI, Circuit Judges, and AMON,

District Judge

June 8, 2023

17

18

19

20

Transcribed By:

TERRI NESTORE

CSR No. 5614, RPR, CRR

24

Job No. 6169798

1 position, and then Netlist had to go run it down for five
2 years.

3 So the breach is determined at the time -- or the
4 materiality is determined at the time of breach.

5 But I understand what Your Honor is saying and I
6 don't think we need to focus too much on that today
7 because materiality is shown enough by Section 6.2, and I
8 really do want to get to something that Counsel said about
9 materiality.

10 JUSTICE SMITH: And as you consider that, will
11 you respond to what I asked Mr. Yoder: If we, arguendo,
12 say 6.2 is ambiguous, do we not have to send this back to
13 the district court for a trial?

14 MR. ASHLEY: No, you do not.

15 And if you look at the Quadrant case, this rule
16 in New York about importing terms, limiting factors, when
17 you have a contract between two sophisticated parties is
18 exalted to such importance -- and I'm going to quote you
19 from Quadrant, quote, Even when there is ambiguity, if
20 parties to a contract omit terms, particularly terms that
21 are readily found in other similar contracts, the
22 inescapable conclusion is that the parties intended the
23 omission. That's what they told the Delaware Supreme
24 Court on a certified question.

25 So I think even if you think there might be some